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No. 90-391

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In The

Supreme Court of the United States

October Term, 1990

LEE'S SUMMIT REORGANIZED SCHOOL DISTRICT R-7, SCHOOL DISTRICT OF THE CITY OF INDEPENDENCE, NORTH KANSAS CITY SCHOOL DISTRICT, MEMBERS OF THEIR RESPECTIVE BOARDS OF EDUCATION AND SUPERINTENDENTS, et al.,

Petitioners,

v.

JENNIFER T. NAYLOR, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF RESPONDENTS NAYLOR, et al., IN OPPOSITION TO CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals' reversal and remand for trial of the district court's grant of summary judgment warrants review by this Court.

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COUNTER-STATEMENT OF THE CASE

The single count complaint in this case was filed on August 9, 1988 by a class of 134 black public school students against three school districts, the petitioners, alleging that in 1988 those districts violated the Fourteenth Amendment by refusing them admittance because

of their race. Joint Appendix at 93. The students had earlier sought, and been denied, admission as tuition-paid, nonresident students.[1] The students also sought, in this complaint and in a parallel motion in *Jenkins*, declaratory and injunctive relief against the State of Missouri defendants for their refusal to fund the students' transfers.[2]

The district court granted motions for summary judgment dismissing the complaint[3] and the students appealed. The court of appeals reversed "because a material factual dispute remains respecting the suburban school districts' racial motivation in refusing to accept black transfer students from the KCMSD." *Jenkins v. Missouri*, 904 F.2d 415, 419 (8th Cir. 1990).[4] The case was remanded for further proceedings. *Id.* at 420.

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[1] As black residents of the School District of Kansas City, Missouri these students were the intended beneficiaries of a voluntary interdistrict transfer proposal that had been ordered in *Jenkins v. Missouri*, 639 F. Supp. 19, 39 (W.D. Mo. 1985), *aff'd*, *Jenkins v. Missouri*, 807 F.2d 657, 684 (8th Cir. 1986), *cert. denied* 484 U.S. 816 (1987), and by which the State of Missouri defendants were to provide transportation and pay the tuition to surrounding school districts for black students from Kansas City.

[2] The State defendants did not seek certiorari from the judgment of the court of appeals and are not now before this Court.

[3] *Naylor v. Lee's Summit Reorg. Sch. Dist. R-7*, 703 F. Supp. 803 (W.D. Mo. 1989).

[4] This case is reported under the *Jenkins* caption because the court of appeals decided parallel issues in *Jenkins* and

(Continued on following page)

REASONS FOR DENYING THE WRIT

Summary of Argument

This Court should deny the petition in this case for two reasons. First, there is nothing in the facts of the case or the proceedings below that remotely gives rise to the issues in the petitioners' questions presented. The petition presents questions that the facts and circumstances of the case simply do not present. The only action the court of appeals took with respect to the petitioners in *Naylor* was to reverse the grant of summary judgment in their favor, as required by some factual errors committed by the district court,[5] and to remand the case to that court to determine whether or not the evidence supports respondents' claims of intentional discrimination. No factual issues were resolved against petitioners. Nor were any legal issues resolved against the petitioners except to say that the evidence proffered by respondents, if proven, might establish intentional racial discrimination. Consequently, no court has held that any of the petitioners has violated the Fourteenth Amendment, and no court has coerced any school district to participate in any voluntary

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Naylor in a single opinion. Petitioners are parties only to the *Naylor* case. No aspect of the *Jenkins* case is now before this Court.

[5] The court of appeals found a "genuine issue of material fact." *Jenkins v. Missouri*, at 420. The basis for this finding is explained in the concurrence at 422-424. *See, e.g. Jenkins* at 423 (Gibson, J., concurring) (" . . . the district court erred in viewing the actions of the suburban school districts as merely preliminary proposals which could not serve as the basis for a finding of invidious discrimination.").

interdistrict transfer plan. Instead, the district court in *Naylor* has been instructed to try the case and has been instructed in *Jenkins*, which is not before this Court, to promulgate and implement a voluntary interdistrict transfer proposal for those school districts, and only those districts, that choose to participate.[6]

Second, the Eighth Circuit correctly applied the law in reversing the district court's grant of summary judgment. Explicitly relying upon and routinely applying the summary judgment standards enunciated by this Court in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and the intentional discrimination standards enunciated by this Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 42 U.S. 252 (1977), the court of appeals properly concluded that the *Naylor* class has presented genuine issues of material fact. Because the district court failed to apply, or incorrectly applied, summary judgment standards, reversal was proper. No other issue was decided against petitioners; therefore, the writ should be denied.

I. There is nothing in the facts and circumstances of the case that gives rise to questions presented in the petition.

Petitioners have raised two questions before this Court. Because there is nothing in the facts and

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[6] Because this order was part of the *Jenkins* litigation, to which petitioners were not parties, it is not properly before this Court. Petitioners' reliance on the *Jenkins* order is therefore not only incorrect, but also misplaced. Indeed, pursuant to the judgment in *Jenkins* the district court on May 14, 1990 promulgated its proposal, the State solicited participation by school districts, and one – Missouri City – agreed. Minority students from KCMSD are now attending school in Missouri City.

circumstances of the case that gives rise to either question, the writ should be denied.

A. Petitioners have not been found to have violated the Fourteenth Amendment.

Petitioners' first question presented raises the hypothetical question whether a suburban school district ("SSD") that chooses not to participate in a voluntary interdistrict transfer proposal, by that fact alone, violates the Fourteenth Amendment. Thus stated, the question overstates the decision below. No court has found that the petitioners violated the Fourteenth Amendment. Nothing in the decision below even suggests that petitioners have or have not violated respondents' constitutional rights. Rather, the Eighth Circuit remanded the case to the district court for a factual determination of the very question that the petitioners claim has been resolved against them below and now seek to present for review to this Court.

Neither the respondents nor the court below has ever suggested that *any* refusal to participate in a voluntary interdistrict transfer proposal, without more, would be unconstitutional. Even the district court, in granting summary judgment in favor of petitioners, noted the narrowness of the issue raised.

> Thus, plaintiffs argue that defendants' post-*Jenkins* refusal to admit plaintiffs as nonresident students evidences an entirely new constitutional violation, one that was not litigated in *Jenkins*. As a result, the question before this court is a narrow one: whether the SSDs refused to admit plaintiffs as nonresident students

> because of their race, in violation of the fourteenth amendment to the United States Constitution or whether the students were refused admission for legitimate, nondiscriminatory reasons.

Naylor, 703 F. Supp. at 812. No court has even considered the issue that petitioners now claim was resolved against them.

This Court's previous opinions make clear, however, that a *racially based* decision not to allow interdistrict transfers from the KCMSD offends the Fourteenth Amendment. *See Arlington Heights*, 429 U.S. at 267 & n.17 (departure from usual procedures or failure to consider usual factors may be evidence of racial animus that violates the Fourteenth Amendment); *Griffin v. County School Bd.*, 377 U.S. 218, 230-32 (1969) (State can close schools, but not for racially based reasons).

Even the barest examination of the Eighth Circuit's opinion reveals that court's acute awareness that a finding of intent is a prerequisite to Fourteenth Amendment liability. While the *Naylor* class had been denied admission by the SSDs, the court of appeals did not find that this refusal violated the Fourteenth Amendment. Instead, the Court "reverse[d] because a material factual dispute remains respecting the suburban school districts' *racial motivation* in refusing to accept black transfer students from the KCMSD." *Id.* at 420. (emphasis added).

If – as petitioners necessarily contend as a premise for seeking this Court's review – the Eighth Circuit had held that intent is not a requisite to liability for refusing to participate in a voluntary interdistrict transfer plan, the appeals court would have been required to grant

summary judgment to respondents. The Eighth Circuit did not do that. Rather, it correctly remanded to the district court for a trial on the merits of the intent question. Because no court has found that the SSDs' refusal to participate in a voluntary interdistrict transfer proposal offends the Constitution, this case does not in fact present the first question that the petitioners hypothetically present to the Court in their petition.

B. The Eighth Circuit's opinion below does not authorize any court to coerce SSD cooperation in a VIT proposal.

The petition similarly mischaracterizes the decision below in its second question presented. The question posed, "whether a federal court may coerce a local government with no history of racial discrimination to participate" in a voluntary interdistrict transfer program promulgated by a federal court, was neither presented nor addressed in the court below. Rather, the entire focus in the *Naylor* decision below was on identifying the proper procedure for determining whether the petitioner local governments *do* have a history of racial discrimination in regard to their decision to refuse admission to the respondent black applicants.

Further, the Eighth Circuit's entire discussion of the district court's responsibilities in regard to promulgating a voluntary interdistrict transfer proposal occurred in its discussion of the *Jenkins* litigation (which is not before this Court), and imposed obligations exclusively on the State of Missouri (which is not a party to this petition) and not on the SSDs (which are not parties to the *Jenkins*

litigation). Again, the opinion is instructive. After discussing the *Naylor* claims, the Eighth Circuit turned to the separate but parallel *Jenkins* litigation. The court first considered and rejected the district court's opinion that the question of State funding for a voluntary interdistrict transfer proposal was not ripe. *Jenkins*, 904 F.2d at 419. The Court then continued: "Resolution of the issues *presented in Jenkins v. Missouri* requires that the district court, after giving the parties an opportunity to suggest proposals, promptly develop a voluntary interdistrict transfer program to implement the remedy called for in its opinion of July 14, 1985, which we affirmed." *Jenkins*, 904 F.2d at 419 (citation omitted) (emphasis added). The Eighth Circuit could not have been more explicit that the voluntary interdistrict transfer order was part of its opinion in the *Jenkins* litigation. Because the SSDs are not parties to the *Jenkins* litigation, they are not in any way bound by the *Jenkins* order and have no standing or cause to raise the *Jenkins* issues before this Court. ~

In any event, even were the *Jenkins* litigation somehow before this Court, petitioners' second question presented inaccurately portrays the Eighth Circuit's order in that litigation. The record and proceedings below contain no suggestion that the district court is empowered to coerce any district to participate in whatever voluntary interdistrict transfer proposal it promulgates for consideration by any districts that care to consider it. To the contrary, the Eighth Circuit quite explicitly told the district court, in default by the State of its five-year-old obligation to do so, to draw up a voluntary interdistrict transfer proposal "so that school districts *which desire to do so* may participate in the 1990-91 school year." *Jenkins*,

904 F.2d at 419 (emphasis added). The Eighth Circuit, thus, simply ordered the district court to take the place of the State in formulating a voluntary interdistrict transfer proposal and offering it to such districts in the Kansas City area as might be interested.

In sum, *Naylor* involves a prior event (the SSDs' refusal in 1988 to admit to their schools a number of black applicants), and the court of appeals' order that the district court determine whether unconstitutional racial animus interceded in that 1988 event. By contrast, *Jenkins* (which is not even before this Court), involves a future event (the promulgation for 1990 and beyond of a voluntary interdistrict transfer proposal), and the court of appeals' order that the district court present that 1990 – and beyond – proposal to the SSDs, and any other interested districts, for such action or inaction as those districts "desire to [undertake]." By eliding those two quite separate events into a single, hypothetical event of petitioners' imagining, question two presents the court with a request for an advisory opinion of just the sort Article III's "case or controversy" requirement forbids this Court to make.

II. The Eighth Circuit correctly remanded the *Naylor* litigation to the district court for a trial on the merits.

The only issue decided against petitioners by the Eighth Circuit was the propriety of summary judgment – *i.e.*, whether the case presented a triable set of factual allegations and proffers on the questions of the SSDs' motivation in refusing to admit the respondent black

children to the SSDs' schools. Unlike the district court, the court of appeals resolved that question based on this Court's summary judgment standard and, on that basis, remanded the case to the district court for resolution on its merits.

A. Unlike the district court, the Eighth Circuit correctly followed this Court's summary judgment analysis.

According to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In 1986, this court clarified the standards to be applied to motions for summary judgment under Rule 56. The Court held that the role of the district court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," *id.* at 255; and summary judgment may not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

The Court further held in *Anderson* that, in determining whether a reasonable jury could find for the nonmoving party, the district court may not apply a

substantive legal standard for assessing whether the non-moving party's proffered evidence makes out its case that is different from or higher than the standard the jury could apply were the evidence presented to a jury. *Anderson*, 477 U.S. at 255. Thus, "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Id.*

The "substantive evidentiary standards" that apply to respondents' intentional discrimination claims in this case are those set out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) and *Washington v. Davis*, 426 U.S. 229, 242 (1976). In both those cases, the Court made clear that circumstantial evidence of intentional discrimination can suffice. *Arlington Heights* at 266; *Davis* at 242. By refusing to credit circumstantial evidence of intentional discrimination, the district court was not "guided by substantive evidentiary standards that apply to the case."[7] Because the Eighth Circuit, by contrast, did adhere to the court's summary judgment analysis in *Anderson* and did adhere to its intentional discrimination analysis in *Arlington Heights* and *Davis*, the Eight Circuit's finding that "a material factual dispute remains"[8] in the *Naylor* litigation compelled its decision to remand for a trial on the merits and certainly presents no basis for review at this stage by this Court.

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[7] *Anderson*, at 266. The Eighth Circuit properly reversed the district court's grant of summary judgment on that basis. *Jenkins v. Missouri*, 904 F.2d at 420.

[8] *Jenkins v. Missouri*, 904 F.2d at 420.

B. The *Naylor* class presented genuine issues of material fact that precluded summary judgment.

Only a cursory examination of one or two of the *Naylor* class' allegations and proffers against each of the three SSDs is necessary to demonstrate genuine issues of material fact.[9]

1. **The evidence of the North Kansas City District's Intentional Discrimination.** When the North Kansas City School District ("NKCSD") rejected members of the *Naylor* class, it had a written policy on nonresident admissions that had existed since 1978. Rather than applying its policy to the requests by the black KCMSD student respondents for admission, however, NKCSD created a special and far more onerous – indeed, prohibitive – policy for those students and those students alone.[10] Even by itself, and apart from plaintiff's other proffered evidence of NKCSD's discriminatory intent,[11] NKCSD's

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[9] In his concurring opinion below, Judge John R. Gibson systematically examined much of the evidence before the district court and agreed that it presented genuine issues of material fact. *Jenkins*, 904 F.2d at 422-424.

[10] NKCSD's special policy required: complete NKCSD authority to choose which students would be accepted; complete NKCSD authority to assign students to specific schools and grades; that parents of transfer students "pledge" to support their child's education and be immediately available for consultation; surrender of the right to direct "any complaint" or "inquiry" into the district's liability for violating the law to any authority other than NKCSD; payment by the applicants to NKCSD for its legal fees and expenses "attributable to the previous *Jenkins* litigation" and to the district's "investigation of voluntary programs;" and participation of school districts in the neighboring State of Kansas in a voluntary interdistrict transfer plan. J.A. at 1132-34.

[11] *See, e.g., Jenkins*, 904 F.2d at 424 (Gibson, J., concurring).

adoption of a new and prohibitive policy specifically tailored to the respondent black children[12] raised an inference of intentional discrimination sufficient to warrant adjudication of respondents' allegations. *See Arlington Heights*, 429 U.S. at 267 (actions differently applied by race and contrary to existing policy can raise inference of intent); *Griffin v. County School Bd.*, 377 U.S. 218, 230-232 (1964) (timing and procedure of changes in policies can suggest intent to withhold benefits from minorities).

2. **The evidence of the Independence School District's intentional discrimination.** Like NKCSD, the Independence School District ("ISD") created a new nonresident student policy in response to admission requests from the black members of the *Naylor* class. In ISD's case, however, the preclusive demands made on the *Naylor* class as a condition for admission were even greater than the NKCSD's demands.[13]

Additionally, the ISD long had exercised the discretion to admit out of district students (nearly all white), whose admission was *not* authorized by the school board's written nonresident-student policy, when the

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[12] In addition to the specific references to the prior *Jenkins* litigation, the plan explicitly limited its new policy to minorities. J.A. at 1135.

[13] ISD required as a prerequisite for admitting the respondent children that they somehow make arrangements for a new elementary school to be built and given to the district, that the applicants pay the district for its past *Jenkins* litigation expenses and that they indemnify the district against future *Jenkins* expenses, and, finally, that the applicant's attorney, Arthur Benson, no longer represent the children with respect to the ISD. *Jenkins*, 904 F.2d at 423 (Gibson, J., concurring).

nonresident students' categories of special educational needs warranted admission.[14] ISD refused, however, to apply this same practice to members of the *Naylor* class, all of whom were black. Application of facially neutral policies in a discriminatory manner can justify an inference of intentional discrimination. *See Arlington Heights*, 429 U.S. at 265-66 (citing cases).

3. **The evidence of the Lee's Summit School District's racial discrimination.** Lee's Summit School District ("LSSD") facially violated its nonresident policy when it refused members of the *Naylor* class. At the time of the applications, LSSD's written policy stated: "Nonresident students may be permitted to attend the district's schools upon payment of tuition as established by the Board." J.A. at 1088.

Rather than applying its written policy, LSSD offered a succession of justifications to refuse the *Naylor* applicants. First, the district refused because the State had taken the position that it would not pay the tuition of the *Naylor* students. After the applicants assured that they would pay "whatever reasonable tuition requirements Lee's Summit may determine," J.A. at 1154, the district modified its answer, stating that the black applicants were denied admission because they had not established "residency [or] property ownership" in the district. J.A. at 991. Therefore, LSSD declared yet a third explanation, namely, that "it is the district's policy to accept nonresident students only as required by law, and in the rare

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[14] Almost all of whom were white students. J.A. at 1387.

situation where a student's family moves out of the district [but the] student [wants] to continue in Lee's Summit schools." J.A. at 1462. Even apart from LSSD's departure from its longstanding written policy when black children asked to take advantage of the policy, LSSD's shifting explanations alone justify an inference of intentional discrimination and therefore preclude summary judgment. *See Arlington Heights*, 429 U.S. at 264-65.

With respect to each district, therefore, the *Naylor* plaintiffs presented more than ample evidence from which a reasonable factfinder could infer intentional discrimination. Because this Court's summary judgment standards require reviewing courts to believe all of the nonmovant's evidence and make all justifiable inferences in the nonmovant's favor, summary judgment was impermissible.

C. Neither *Wygant* nor *Goldsboro* are in conflict with the Judgment of the Eighth Circuit.

The petitioners seek artificially to create a conflict between the judgment below and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In *Wygant* this Court disapproved of a remedial order that required giving employment preferences to minority teachers. Here the court of appeals simply remanded the complaint to the district court to hear the factual issues and to determine if there is a violation of the Constitution. If such a violation is found then and only then will the question of appropriate remedies be presented. Similarly, no conflict exists with *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324 (4th Cir. 1984). There the Fourth Circuit held

that a school district had no duty to remedy a racial imbalance in a neighboring district. That issue is not presented here. The court of appeals has only remanded this case for a determination of whether these districts violated the Fourteenth Amendment by intentionally denying respondents admission because of their race. Neither *Wygant* nor *Goldsboro* speak to this issue. Petitioners are desperately seeking solace where none is to be found.

Summary

Importantly, no court has ordered any of the petitioners to participate in a voluntary interdistrict transfer plan. Nor has any court made findings of fact adverse to petitioners. Rather, the court of appeals has simply directed the district court to inquire into the motivation that has led the SSDs to follow long held policies and admit white interdistrict transfer students but to abandon those same policies and refuse to admit black transfer students. Fairly read, therefore, the petitioners ask this Court to advise them of the proper outcome on a hypothetical situation in which a hypothetical court renders a hypothetical order – premised on something *other* than the SSDs' motivations – of a sort that no party or court in this case has suggested could permissibly be rendered. Further, petitioners seek this advice *before* trial on a complaint raising allegations that depart from the petitioners' hypothesized contentions in all relevant respects. Whether such issues as petitioners raise will ever be ripe cannot be known, but they surely are not ripe now.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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